

# DECRIMINALIZATION OF ADULTERY BY THE SUPREME COURT'S OF INDIA: AN ANALYSIS FROM GENDER PERSPECTIVE

Written by *Dr. Banamali Barik*  
Asst. Professor in Mayurbhanj Law College, Takatpur, Baripada

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## Abstract:

The one and half centuries old statutory provision of adultery, as define under section 497 IPC, 1860 seeks to punish only men for adultery and treats women involved in the crime as victims. It also provides for criminal sanction against a man for having sexual intercourse with someone else's wife without her husband's consent. In the present age the meanings of gender and sexuality have undergone a lot of change and women are being treated equally with men. The relationship, position and status of the wife within the family have undergone radical changes. The relationship between the two is no more that of master and servant. Women are no more considered the property of their husband. Both are equal in eye of law and equality is the governing parameter over them. On 27<sup>th</sup> September the Supreme Court in its judgment in Joseph Shine's case, striking down Section 497, declared that it is unconstitutional, as it violates Articles 14, 15 and 21 of the Constitution.

## Introduction:

The word 'adultery' is derived from the French word '*avoutre*', which has evolved from the Latin verb '*adulterium*' which means "to corrupt". The concept of a wife corrupting the marital bond with her husband by having a relationship outside the marriage was termed as 'adultery'.<sup>1</sup> The definition of adultery emanated from the historical context of Victorian morality, where a woman was considered to be the 'property' of her husband; and the offence was committed only by the adulterous man. The adulterous woman could not be proceeded against as an 'abettor' even though the relationship was consensual.

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1. The New international Webster's Comprehensive Dictionary of the English Language, Deluxe Encyclopedic Edition, (Trident Press International, 1996) at 21.

The actual definition of adultery varies in different jurisdictions but the basic theme is sexual relations outside marital wed-lock.<sup>2</sup> Adultery, also known as '*infidelity*' or '*extra-marital affair*', is certainly a moral crime and is thought-out a *sin* by almost all religions. There is however, difference in the literal, social and legal definitions.<sup>3</sup> The dictionary meaning of 'adultery' connotes voluntary sexual intercourse of a married person other than his or her spouse.<sup>4</sup> Thus, the dictionary meaning of 'adultery' signifies gender neutrality and it may be committed by either of any sex. It proposes conditions for commission of 'adultery' act by the person when-

- He or she has a sexual intercourse with opposite sex;
- Either one or both of them are having, living spouse and knowledge about it;
- Such sexual intercourse is voluntarily committed.

From social point of view, 'adultery' means an extra-marital voluntary sexual intercourse between heterosexual persons either or both of them being married having a living spouse. The legal definition of adultery varies from country to country and statute to statute. While at many places adultery occurs when a woman has voluntary sexual intercourse with a person other than her husband, at other places adultery is when a woman has voluntary sexual intercourse with a third person without her husband's consent. In India, the legal provision under penal statutes signify 'female adultery' where only the section consider adultery if occur with married women only.<sup>5</sup>

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2. According to Encyclopedia Britannica, Adultery means, sexual relations between a married person and someone other than the spouse. Written or customary prohibitions or taboos against adultery constitute part of the marriage code of virtually every society. Indeed, adultery seems to be as universal and, in some instances, as common as marriage. See, <http://www.britannica.Com/EBchecked/topic/6618/adultery>, visited on 25.10.2018.

3. The definition of 'adultery' that occur in the dictionary is gender neutral, where, it may be committed by either of the sex. However, under most of the statutes, it gender favoured and mostly prescribe 'female adultery' which has been webbed around the married woman whose consensual extra-marital sexual involvement without the consent of her husband is an essential condition of 'adultery'.

4. The Concise Oxford Dictionary of Current English, 6<sup>th</sup> end. Oxford University Press, at 15.

5. Available at: <http://ssm.com/abstract=1856991>, visited on 28.10.2018.

Adultery is an invasion on the right of the husband over his wife. It is an offence against the sanctity of the matrimonial home and an act which is committed by a man.<sup>6</sup> It is an anti-social and illegal act. It consists in having carnal knowledge of a married woman<sup>7</sup> with knowledge of that fact, without the consent or connivance of her husband.<sup>8</sup> To constitute adultery, sexual intercourse is a necessary ingredient.<sup>9</sup>

Law and society are intrinsically connected and oppressive social values often find expression in legal structures. The law influences society as well but societal values are slow to adapt to leads shown by the law. The law on adultery cannot be construed in isolation. To fully comprehend its nature and impact, every legislative provision must be understood as a 'discourse' about social structuring. However, the discourse of law is not homogenous. In the context particularly of section 497, it regards individuals as 'gendered citizens'. In doing so, the law creates and ascribes gender roles based on existing societal stereotypes. An understanding of law as a 'discourse' would lead to the recognition of the role of law in creating 'gendered identities'.<sup>10</sup>

Section 497, IPC was introduced in to the penal code right at the time of enactment of the code in 1860. It continued to function in the manner in which it was enacted till the advent of the constitution of the republic in 1950. The concern is whether the section would be at loggerheads with Article 14 of the constitution, which guarantees the right "equality before law", on account of the fact that it leaves out the woman adulterer from the purview of punishment while punishing her male lover, arose. However, such concerns were laid to rest due to the presence of Article 15(3) of the constitution which provides for special provisions for women. It is in the furtherance of this principle enshrined in the constitution that women continued to be left out from the purview of punishment for the commission of adultery.

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6. Olga Thelma Gomes V. Mst Nandu, AIR 1965 MP 268 (269).

7. Dalip Singh, AIR 1949 All 237.

8. M. Clarence v. M. Raicheal, AIR 1964 Mys 67.

9. Munir v. Emperor, (1925) 24 ALJR 155.

10. Ratna Kapur & Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, (New Delhi: Sage Publications, 1996) at 40-41.

Article 17 of the Universal Declaration of Human Rights, 1948 declares that all are equal before the law and are entitled without any discrimination to the equal protection of laws. By and large the same concept of equality inheres in Art. 14 of the Indian Constitution. Also Art.14 of the constitution corresponds to the equal protection clause of the 14<sup>th</sup> amendment of the U.S. Constitution which declares: “No state shall deny to any person within its jurisdiction the equal protection of laws”.<sup>11</sup>

Above provisions relating to and dealing with adultery have made their way into the penal code from long times, thereby giving an indication that the crime is not of recent but rather, of ancient origin.

On 27<sup>th</sup> September, 2018 our Hon’ble Supreme Court overruled the *Sowmithri Vishnu v. Union of India*,<sup>12</sup> *V. Revathi v. Union of India*,<sup>13</sup> and *W Kalyani v. State*,<sup>14</sup> held that Section 497 is struck down as unconstitutional being violative of Articles 14, 15, and 21 of the Constitution. The present article compared to examine ‘adultery’ in India and other countries with the recommendations of commissions and committees. How far the apex courts of India challenges the constitutionality of Section 497 IPC, in the equality and gender prospective.

### **Adultery in other countries:**

The criminal law of adultery varies from country to country. It is not uniform. It differs according to the religious norms, attitude of the people and many other factors. The provisions relating to adultery in some of the countries are given below:

United States: The law relating to criminal adultery prevailing in different States in the United States reveals that three major formulations of adultery exist under state laws in the United States namely:

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11. See *Offence of Adultery in India-a study-shodhganga*, Available at:<http://shodhganga.inflibnet.ac.in/jspui/bitstream/10603/205033/1/offence%20of%20adultery%20-%20a%20a%20a>, visited on 02.12.2018.
  12. (1985) Supp SCC 137.
  13. (1988) 2 SCC 72.
  14. (2012) 1 SCC 385.

- the Common law view;
- the canon (a law or body of laws of a church);
- the hybrid view.

According to the Common law view, adultery takes place only when the woman is married and both husband and wife are held liable.

Under the canon law view, adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife and only the married person is held guilty.

According to the hybrid rule, followed in twenty states in the United States, if either spouse has sexual intercourse with a third party, both transgressors are guilty of adultery.

Finally, eight states held both transgressors guilty, if the woman is married, but if the woman is single only the man is guilty. Six states do not punish adultery at all.

England and France: Adultery is not a criminal offence in the United Kingdom. It is punishable, through mildly, in some of the European countries. For instance, in France, a wife guilty of adultery is punishable for a period ranging from three months to two years of imprisonment. The husband however, may put an end to her sentence by agreeing to take her back. The adulterer is punishable similarly.

Germany: In Germany, if a marriage is dissolved as result of adultery, the guilty spouse as well as the guilty partner, is punishable with imprisonment for a term of not less than six months, but prosecution has to be initiated by the aggrieved spouse by means of a petition.

Pakistan and Islamic countries: In Pakistan adultery is viewed as a heinous offence and both the man and woman are subjected to punishment which may extend to the death sentence. In 1987, a Pakistani Court of Session sentenced a couple to be buried up to their necks and stoned to death in public for committing adultery. In April 2002, as stated earlier, Zafran Bibi was sentenced to death by stoning in North West Frontier province for adultery. Perhaps such a severe sentence for adultery is awarded in Pakistan since Islamic Penal Law (Huddod Ordinance) was introduced in 1980. In some other Islamic countries, such as Saudi Arabia, Iran, Egypt, etc., also like Pakistan, adultery is punished severely.

Malaysia, Singapore and Hong Kong: Malaysia, which is predominantly a Muslim country, adultery is not an offence under the Penal Code. It may be because of Singapore and Hong Kong influence, where adultery is not punishable.

Philippines: It is of interest to note that in Philippines, which is a catholic dominated Christian country, it is the married woman and not the husband, who is liable for adultery.<sup>15</sup>

### **Adultery in India:**

The original draft of IPC prepared by first Law Commission was silent about the offence of adultery. Lord Macaulay, who was unwilling to add the provision criminalizing adultery as an offence, observed, “There are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives.”<sup>16</sup> The basic objective of keeping ‘adultery’ out of the penal statute was the social norms which has already provided the values and norms which take care of such instances. The circumstances he referred to included child marriage and polygamy. Macaulay, hence, advised that it would be enough to treat it as a civil injury. Thus, framers of the Code did not include adultery as a crime; it was only after the recommendation of the second Law Commission it was added to the Code.<sup>17</sup>

Thus, it is on the record that the framers of the Code did not make adultery an offence punishable under the Code. But the Second Law Commission, after giving mature consideration to the subject, came to the conclusion that it was not advisable to exclude this offence from the Code.<sup>18</sup> The Second Law Commission thought otherwise and said it would not be proper to leave the offence out of the IPC and suggested that only the man be punished, again keeping in mind the condition of women in the country.

The argument given that why the wife would not be punished has been provided as follows:

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15. K. D. Gaur, *The Indian Penal Code*, 4<sup>th</sup> edn. (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2011) at 801-802.

16. K. D. Gaur, *The Indian Penal Code*, 2<sup>nd</sup> edn. (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 1998) at 388.

17. Ratanlal & Dhirajlal, *Law of Crimes*, 26<sup>th</sup> edn., Vol.(II), (Bhart Law House, 2007) at 2710.

18. *Ibid.* at 2305.

“Though we well know that the dearest interests of the human race are closely connected with the chastity of woman and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attention of a husband with several rivals, to make laws for punishing the inconsistency of the wife, while the law admits the privilege of the husband to fill his ‘*zenana*’ with woman, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of penal law.<sup>19</sup>

Thus, in India a wife is not punished as an adulterous or an abettor for the offence of adultery. It is only the man who has such unlawful sexual intercourse with married woman will be punished under section 497, IPC. Moreover, the wife of the adulterer has no *locus standi* to file a complaint against her deviated husband. It is only the husband of the (adulteress) wife who can file a complaint and upon whose complaint the Court can take cognizance of the offence. This position of law regarding making complaint has been clearly provided under section 198(2) of Cr.PC, treats the husband of the (adulteress) wife an aggrieved party and not the wife of the adulterer husband.

The object of making ‘adultery’ as an offence and restricting it to ‘man’ alone was to deter ‘man’ from taking advantage of woman starved of the love and affection of her husband and deter man from having sexual relations with the wife of other man. Since men had the social sanction to maintain such relations and women were starved of the love and affection of their husbands, women were treated as the victims and not the authors of the crime.

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19. K. D. Gaur, *supra* note 16 at 734.



When section 497 was enacted there were no codified personal and matrimonial laws like today but they were unequal and inoperative.<sup>20</sup>

Apart from IPC, there is one other penal legislation in India that regulates 'Adultery' in India. Ranbir Penal Code, 1932 especially applicable to the State of Jammu and Kashmir is one such legislation. It provides under section 497 for the punishment for the offence of adultery, it reads.

“Adultery: Whoever has sexual intercourse with a person who is and whom he knows or reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall be punishable as an abettor.”<sup>21</sup>

It is important to note that a bill in 1972, as the Indian Penal Code (Amendment) Bill, 1972 suggested that special privileges granted to woman under section 497 of Code be done away with. However, the amendment of the section could not be carried out and law remains as it was when enacted in 1860 was as follows:

“20.18 After much discussion and careful consideration, we are of the opinion that the exemption of the wife from punishment under section 497 should be removed, that the maximum punishment of five years imprisonment prescribed in the section is unreal is unreal and not called for in any circumstances and should be reduced to two years, and that with these modifications, the offence of adultery should remain in the Penal Code. It is accordingly recommended that the section may be revised, as follows:

“497-Adultery- If a man has sexual intercourse with a woman who is and whom he knows or has reason to believe to be, the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, the man and woman

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20. See Varad Deore, A Provision Redundant in Penal Law in Changed Legal and Social Context, Available at: <http://www.legalserviceindia.com/article/1291-Adultery-html>, visited on 17.10.2018.

21. Ibid.



are guilty of the offence of adultery, and shall be punished with imprisonment of either description of a term which may extend to two years, or with fine, or with both”.<sup>22</sup>

Thus, the proposal of Law Commission is to bring the section of the line of gender neutrality without discriminating the two different sexes and making them criminally liable in equal degree. However, the Law Commission had proposed the lesser degree of punishment.<sup>23</sup>

### **Adultery and gender perspective:**

The Fifth Law Commission of India, as early as in 1971 recommended that the exemption of the wife from punishment for committing adultery be removed from section 497 IPC. It also felt that an imprisonment for a term up to five years is unreal and not called for in any circumstances. The recommended section 497 read as:

“Adultery- if a man has sexual intercourse with a woman who is and whom he knows or has reason to believe to be wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both”. However, the joint select Committee substituted the above revised section 497 by the following:

“Whoever has sexual intercourse with a person who is, and whom he knows or has reason to believe to be the wife or husband as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse by the man not amounting to the offence of rape, commits adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or both”. Inspired by the spirit of equality the fifth law commission and joint select committee have thus, shown their inclination to the equality of sexes by recommending equal culpability for the man as well as the woman for committing adultery.

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22. K. D. Gaur, supra note 16 at 734.

23. Available at, supra note 5.

Surprisingly, however, for reasons best known to them, neither the law commission nor the joint select committee has shown any sensitivity to the equally pertinent traditional proprietary rights of the husband over his wife and to the subordination of woman in the Indian family institution. Mrs. Anna Chandi, one of the distinguished members of the fifth law commission, voicing her reservations about the revised section 497 suggested by her other colleague Law Commission, observed:

“The wife being considered the husband’s property, the present reserves for the husband the right to move the law for punishing any trespass on it. While not giving the wife any corresponding right to complain against any transgressions on the part of or relating to her husband. Perhaps to make amends for this harsh discrimination, the present section provides that the wife should not be punished along with the trespasser. The removal of this exemption clause does not cause damage to the basic idea of being the wife to be the property of husband. On the other hand, it merely restates the idea, and adds a new dimension to it by making not only the trespasser but the property also liable to punishment. This as noted before can hardly be considered a progressive step”.<sup>24</sup>

The apex court, curiously, did not attach any judicial significance to the proposal for reform recommended by the fifth law commission and of the joint select committee approved by the Rajya Sabha. It could have justifiably relied upon these proposals to inject equality in the adultery law. But it preferred to assert time and again, that it is for the legislature to take cognizance of the social transformation and the changed values as they involve questions of policy of law.<sup>25</sup>

### **Recommendations on Malimath Committee in relating to adultery:**

In March 2003, the Malimath Committee on Reforms of Criminal Justice System<sup>26</sup> was constituted by the Government of India, which considered comprehensive measures for revamping the Criminal Justice System.

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24. Anna Chandi, Member of *Law Commission of India*, Forty-second Report: Indian Penal Code, at 365.

25. Available at, supra note 11.

26. Report of the Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Chaired by Justice V. S. Malimath, (2003). Available at: <https://mha.gov.in/sites/default/files/criminal-justice-system.pdf>.

The Malimath Committee made the following recommendation with respect to ‘adultery:

“A man commits the offence of adultery if he has sexual intercourse with the wife of another man without the consent or connivance of the husband. The object of this Section is to preserve the sanctity of the marriage. The society abhors marital infidelity. Therefore, there is no good reason for not meting out similar treatment to wife who has sexual intercourse with a married man. The Committee therefore suggests that Section 497 of the IPC should be suitably amended to the effect that ‘Whosoever has sexual intercourse with the spouse of any other person is guilty of adultery’ ....”

The recommendations of the Malimath Committee on the amendment of Section 497 were referred to the Law Commission of India, which took up the matter for study and examination. The same was pending consideration.<sup>27</sup>

#### **Recommendations on National Commission for women and adultery:**

The National Commission on Women in its report has leveled an argument against the existing provision of section 497, of the IPC. Expressing its lament attitude, it expressed that the existing provision in the IPC, is based on the mindset that the wife is a personal possession of the husband, who is the sole aggrieved person in an incident of adultery. On this line, the Commission has recommended suitable amendment to Section 198(2) of the Criminal Procedure Code, which as of now disqualifies the wife of an unfaithful husband from prosecuting him for his promiscuous behavior.

This argument is however not tenable in the light of the object of Section 497 of IPC and the Apex Court judgment in V. Revathi case.<sup>28</sup> The section attempted to cover family as an institution and punishes infidelity committed by outsider stranger. It can also be conveniently says that is ample scope for women as an individual to punish the man, though a marital relationship exist between them. Specially, Section 498(A) also provides scope for wife to punish any act of husband.

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27. In the Supreme Court of India, Criminal Original Jurisdiction, Writ Petition (Criminal) No. 194 of 2017, Para: 6.3.1-3.) at 22-23.

28. V. Revathi v. Union of India & Others, 1988 Cri. LJ.921.

It is also argued in the same report of National Commission of Women that despite the other provisions are available there is no reason that she should be debarred from initiating prosecution under Section 198 of Cr.PC. However this argument is also ridiculous because if the Section 497 of IPC would have brought on the line of gender neutrality, it would defeat it's both the basic purpose i.e. protecting harmony in marriage institution and protect woman.<sup>29</sup>

In another important recommendation, the Commission has said adultery should be treated as a civil wrong and not a criminal offence. It is of the view that there may be many instances where the woman wants to save the marriage and sees the adulterous where the woman want to save the marriage and sees the adulterous relationship as an aberration. This argument is appeared to be sound, mature, strong and imbibe the solution amicable to modern society. However, analysis of this argument will be dealt under the separate heading of this paper.<sup>30</sup>

**Committee to Draft a National Policy on Criminal Justice, to suggested de-criminalizing adultery:<sup>31</sup>**

The draft National Policy on Criminal Justice, authored by the Madhava Menon Committee, has also suggested de-criminalizing adultery by recommending that it should be treated as a social rather than a criminal offence.

The dying controversy regarding constitutionality of the adultery breathed a new lease of life by the insistence of the national commission of women and the report of the Madhava Menon Committee. The law on adultery has been criticized both on constitutional grounds since its inception but it still managed to remain unaltered in our law books in this democratic India. The libertarian's view is that the Government must not intrude into daily personal lives and that such disputes are to be settled privately rather than prosecuted and penalized by public entities.

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29. Again, S. 498 which is immediately next to S.497 give wider scope for the woman (including wife) to tackle the husband who is involve in infidelity of marital offences. 'Cruelty' also includes 'sexual exploitation' or 'sexual neglect'. Beside the same , the new Domestic Violence Act,2005 give better vintage point to the woman to settle score against the man., if she so desire. Therefore, the NWC's argument especially in case of section 497 is weak, without much research, and only on the line of 'gender cry'.

30. Available at, supra note 5.

31. Chairman of Prof. N.R. Madhava Menon, *Committee to Draft a National Policy on Criminal Justice*, Ministry of Home Affair, Government of India, 31<sup>st</sup> July 2007.

Opponents of adultery laws regard them as painfully archaic, believing they represent sanctions reminiscent of nineteenth century novels. They further object to the legislation of morality, especially a morality so steeped in religious doctrine. Support for the preservation of the adultery laws comes from religious groups and from political parties who feel quite independent of morality, that the government has reason to concern itself with the consensual sexual activity of its citizens.... The crucial question is: when, if ever, is the government justified to interfere in consensual bedroom affairs.

### **Judiciary challenges to adultery in India:**

The Supreme Court has previously considered challenges to Section 497 inter alia on the ground that the impugned section was violative of Articles 14 and 15 of the Constitution in equality and gender prospective.

In *Yusuf Abdul Aziz v. State of Bombay*,<sup>32</sup> Section 497 was challenged before the Supreme Court inter alia on the ground it contravened Articles 14 and 15 of the Constitution, since the wife who is *pari delicto* with the adulterous man, is not punishable even as an 'abettor'. A Constitution Bench of this court took the view that since Section 497 was a special provision for the benefit of women, it was saved by Article 15(3) which is an enabling provision providing for protective discrimination.

In *Yusuf Aziz* case, the court noted that both Article 14 and 15 read together validated Section 497.

In *Sowmithri Vishnu v. Union of India & Anr*,<sup>33</sup> a three-judge bench of this court addressed a challenge to Section 497 as being unreasonable and arbitrary in the classification made between men and women, unjustifiably denied women the right to prosecute her husband under Section 497. It was contended that Section 497 conferred a right only upon the husband of the adulterous woman to prosecute the adulterer; however, no such right was bestowed upon the wife of an adulterous man.

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32. 1945 SCR 930.

33. (1985) Supp SCC 137.

The petitioners therein submitted that Section 497 was a flagrant violation of gender discrimination against women. The Court opined that the challenge had no legal basis to rest upon. The court observed that the argument really centered on the definition, which was required to be re-cast to punish both the male and female offender for the offence of adultery.

The Court repelled the plea on the ground that it is commonly accepted that it is the man who is the 'seducer' and not the woman. The Court recognized that this position may have undergone some change over the years, but it is for the legislature to consider whether Section 497 should be amended appropriately so as to take note of the 'transformation' which the society has undergone.

In *V. Revathi v. Union of India*,<sup>34</sup> a two-judge bench of this court upheld the constitutional validity of Section 497, IPC and Section 198(2) of the Cr. PC . The petitioner contended that whether or not the law permitted a husband to prosecute his disloyal wife, a wife cannot be lawfully disabled from prosecuting her disloyal husband. Section 198(2) Cr.PC operates as a fetter on the wife in prosecuting her adulterous husband. Hence, the relevant provision is unconstitutional on the ground of obnoxious discrimination. This Court held that Section 497 IPC and Section 198(2) Cr. PC together, former being substantive and the latter being largely procedural. Women, under these provisions, neither have the right to prosecute, as case of a wife whose husband has an adulterous relationship with another woman; nor can they be prosecuted as the *pari delicto*.

The view taken by the two-judge bench in *Revathi* case, that the absence of the right of the wife of an adulterous husband to sue him, or his paramour, was well-balanced by the inability of the husband to prosecute his adulterous wife for adultery, cannot be sustained. The wife's inability to prosecute her husband and his paramour should be equated with the husband's ability to prosecute his wife's paramour.

The right to privacy is an inalienable right, closely associated with the innate dignity of an individual, and the right to autonomy and self-determination to take decisions. Reliance was placed on the judgment in *Shafin Johan v. Asokan K.M. & Ors*,<sup>35</sup> where this Court observed that

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34. (1988) 2 SCC72.

35. 2018 SCC Online SC 343.

each individual is guaranteed the freedom in determining the choice of one's partner, and any interference by the State in these matters, would have a serious chilling effect on the exercise of the freedoms guaranteed by the Constitution.

The Petitioner in *v. Union of India*, placed reliance on the judgment of *K.S. Puttaswamy v. Union of India*,<sup>36</sup> wherein a nine-judge bench of this Court held that the right to make decisions on vital matters concerning one's life are inviolable aspects of human personality. This Court held that:

“169... The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action....”

The Petitioner Joseph Shine and Interveners have prayed for striking down Section 497 IPC and Section 198(2) of the Cr.PC as being unconstitutional, unjust, illegal, arbitrary and violative of Fundamental Rights of citizens.<sup>37</sup>

Lastly, the Supreme Court has analyzed, (*Joseph Shine case*) Section 497 of the IPC, it is placed under Chapter –XX, of “Offences Relating to Marriage”

The provision of Section 497 is replete with anomalies and incongruities, such as:

- I. Under Section 497, it is only the male-paramour who is punishable for the offence of adultery. The woman, who is *pari delicto* with the adulterous male, is not punishable, even as an ‘abettor’. The adulterous woman is excluded solely on the basis of gender, and cannot be prosecuted for adultery.<sup>38</sup>

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36. (2017) 10 SCC 1.

37. In the Supreme Court of India, *supra note*, 27 at 40-41.

38. *W. Kalyani v. State*, (2012) 1 SCC385.



- II. The Section only gives the right to prosecute to the husband of the adulterous wife. On the other hand, the wife of the adulterous man has no similar right to prosecute her husband or his paramour.
- III. Section 497 IPC read with Section 198(2) or the Cr.PC, only empowers the aggrieved husband, of a married wife who has entered into the adulterous relationship to initiate proceeding for the offence of adultery.
- IV. The act of a married man engaging in sexual intercourse with an unmarried or divorced woman does not constitute 'adultery' under Section.
- V. If the adulterous relationship between a man and a married woman, takes place with the consent and connivance of her husband, it would not constitute the offence of adultery.

The anomalies and inconsistencies in Section 497 as stated above would render the provision liable to be struck down on the ground of it being arbitrary and discriminatory.<sup>39</sup>

### **Conclusion:**

The first draft of the Indian Penal Code framed in 1837, Macaulay argued that in the social infrastructure that existed in those times, the secondary and economically dependent position of women was not conducive to punish adulterous men. So far as women are concerned, his opinion was that considering the social *pardah* among Hindus, especially among aristocratic, high-cast and affluent families, the question of adultery among women did not arise. Besides, Macaulay was convinced that since polygamy was an everyday affair at that time, the wife was socially conditioned to accept her husband's adulterous relationship. She neither felt humiliated nor was it a culture shock for her.<sup>40</sup>

Gone are those days when the women were a suppressed and humiliated lot. They can no longer be discriminated as victims in cases of adultery. Now the Law commission of India, Malimath Committee, National Commission for Women, United Nation Working Group on Law etc. have suggested for amendment of the adultery law in India.

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39. In the Supreme Court of India, supra note 27 at 45-46.

40. Macaulay's *Draft Penal Code*, Notes, Note Q, (1873) at 90-93.

The new interpretations of the fundamental rights based on gender perspective by the apex court of India have led to de-criminalization of adultery. However, there are views that the decision will affect the institution of marriage, as over the years, section 497 IPC, was protecting the institution of marriage and also protecting social wellbeing.

On 27 September 2018, Supreme Court of India delivered the decision on adultery. It analyzed section 497 IPC, which was more than one and half century old law, and declared that: (i) Section 497 is struck down as unconstitutional being violative of Articles 14, 15 and 21 of the Constitution. (ii) Section 198(2) of the Cr.PC, which contains the procedure for prosecution under Chapter-XX of the IPC, shall be unconstitutional only to the extent that it is applicable to the offence of adultery under section 497. De-criminalization adultery may have an impact on the aggrieved spouse, children and society at large. Acceptance of de-criminalization among the Indians, specifically the Hindu and Muslim middle class families are doubtful.